

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1286

To be argued by
LAWRENCE STERN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

In the Matter of the Grand Jury
Subpoena Served Upon

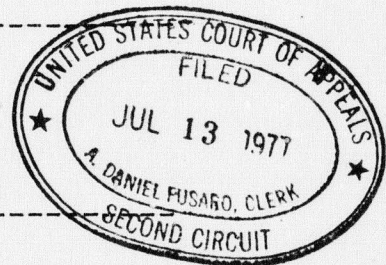
PEDRO ARCHULETA

-----X

AN APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

BRIEF FOR APPELLANT

-----X



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
In the Matter of the Grand Jury
Subpoena Served Upon

PEDRO ARCHULETA
-----x

ISSUES PRESENTED

1. Whether Appellant has been deprived of the constitutional rights to due process, equal protection, freedom of speech and assembly, grand jury indictment and secrecy, and the privilege against self incrimination by his incarceration for refusal to answer questions posed by a prosecutor, unrelated to the stated purpose of a subpoena, which itself violates speech and assembly freedoms, without a showing to the Court and Grand Jury of any nexus between the witness and the subject of the questions, without the informed participation of the Grand Jury under whose power the compulsion has been exercised, and given the dual Grand Jury target-witness system being abused under the circumstances of this case.
2. Whether a witness who is the target of an investigation in one jurisdiction has good cause for refusing to testify, following a grant of use immunity in another, where there is a real danger that he may be indicted as a result of that testimony.
3. Whether in view of a district court finding of a colorable showing of electronic surveillance, the conceded national scope of this investigation, and the Court's suggestion that New Mexico sources should be checked, the government's refusal to check Chicago, New Mexico and New York law enforcement authorities and the otherwise inadequate response by the FBI and the Justice Department requires that a contempt order be reversed.
4. Whether appellant has the constitutional and statutory right and consequent standing to challenge the composition of the Grand Jury that seeks, albeit as the result of an uninformed or unexercised discretion in this case, to incarcerate him and he thereby is entitled to the jury selection records and a reasonable time to make the challenge.

5. Whether fingerprints, photographs, and other particulars taken from appellant over his objection upon his incarceration pursuant to this civil contempt should be expunged.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Owen, J) entered June 30, 1977, holding appellant in contempt for his refusal to answer the prosecutor's questions in the grand jury and incarcerating him pursuant to 28 U.S.C. §1826 for the life of the grand jury, 18 months, or until he answers the questions.

Timely notice of appeal was filed; stays and bail were denied by the District Court and by this Court on July 8, 1977, and Lawrence Stern was assigned as counsel on appeal.

Appellant is presently incarcerated at the Metropolitan Correctional Center.

B. Statement of Facts

1. Chronology of the Dual Target-Witness Prosecutorial Inquisition

On October 28, 1976, the term of the Grand Jury in the Southern District of New York investigating the so-called F.A.L.N. bombings (the April, 1975, Grand Jury) expired. Its term was apparently not extended and its investigation had apparently produced no indictment or substantial investigatory leads. On November 3, 1976, in Chicago, an apartment containing explosive

materials was found accidentally by the Chicago police, who followed and arrested a drug addict who had stumbled on the cache and was selling it on the street (Appendix I). The apartment had been rented in the name of Carlos Torres, and a letterhead of the National Commission for Hispanic Affairs of the Episcopal Church (NCHA) was found in the apartment. Torres and a second man, Oscar Lopez, were charged, and arrest warrants issued.

On November 9, 1976, a new Grand Jury was impaneled in the Southern District, apparently so the FBI and the prosecutor could use its subpoena power to investigate the new leads obtained in Chicago (See AUSA Engle aff. of June 24th, 1977*).

In Chicago, there had been a federal grand jury (February, 1975) in the Northern District whose, "number was on record before that bombing factory was found," but who had not been apprised by the prosecutor there of the latest developments in the case (Appendix J: Proceedings 12-1-76, USDC ND Ill (Parsons, J) at p. 21, 19-24). Although the "factory" was found on the third of November, the Grand Jurors in Chicago were not told about it or about Carlos Torres until December 1, 1976. The Grand Jury was not a party to subpoenas returnable that day, issued sua sponte out of the United States Attorney's office

* Documents not appearing in the Appendix are included in the Record on Appeal filed in this Court.

against several witnesses and a "target," the appellant herein, who had been served by the FBI on November 23, 1976 (Id.). The FBI was armed with this subpoena when they "threatened" appellant with its use if he didn't talk to them (Appendix C at 27; opinion of Judge Lasker); he didn't, and they served it. The Grand Jury had played no role.

Appellant, Pedro Archuleta, is a resident of La Puente, New Mexico, located approximately 150 miles north of Albuquerque. He is employed as project coordinator for La Clinica del Pueblo (a medical clinic) and La Cooperacion (a community service corporation) in Tierra Amarilla, a few miles from his home. He has worked with these organizations since 1970. Tierra Amarilla is in Rio Arriba County, which is sparsely populated, rural and one of the poorest areas in the country. In 1972 and 1973 he was a member of the National Commission on Hispanic Affairs (NCHA) of the Episcopal Church. The Hispanic Commission has provided operating funds to a law office in Tierra Amarilla which represents La Clinica and La Cooperacion. (Affidavits of Pedro Archuleta and Valentina Tijerina in support of the Motion to Quash; See Appendix O and P).

Mr. Archuleta is married and has two young children. The family lives in a wood-heated house, hauls water from outside the area of the house and raises its own food. Mr Archuleta's wife, Beronice has averred,

...I am terribly afraid that if Pedro is kept away from our family for any period of time we would be completely unable to

support ourselves due to the loss of his salary and the absence of anyone to chop wood, haul water, do the farming and fix up the house which is in severe need of repair...since November, 1974, when I was operated on for varicose veins, I have been unable to do very much physical work as I cannot be on my feet too long and as a result I cannot do the physical work required around our home that Pedro does.

(Appendix S)

Mr. Archuleta has averred,

I believe that all the subpoenas served on me are invalid because of gross abuse by the government and perversion by the government of the grand jury process ...The FBI presence in northern New Mexico in the last year and one half and my subpoenas to New York and Chicago have made it clear that when Chicanos in New Mexico which actively concern themselves with fighting political abuses against our people, they will be investigated and torn away from their homes, families, and work.

(Appendix O)

La Clinica and La Cooperacion were founded by local Chicano residents from the Tierra Amarilla area. The original and continuing concern of these groups was the land grant issue in New Mexico and the Southwest. Since their inception, and subject to local political opposition, they have attempted to meet the human and economic needs of people in their area.

(Affidavit of Maria Varela in support of Motion to Quash; Appendix P). In the last several years, appellant, the organization with which he works, other people connected with those organizations, and other organizations have been involved in

challenging the leadership and policies of individuals who have long controlled jobs and politics to the detriment of poor and powerless people in northern New Mexico. This challenge has been in the form of providing jobs for people with community organizations, running candidates for office, filing law suits and publicizing abuses within the county by law enforcement officials. (Affidavits of Pedro Archuleta and Maria Varela in support of Motion to Quash; Appendix O and P.)

The response of law enforcement agencies ranging from the FBI to the Rio Arriba Sheriff's office has been a campaign to intimidate appellant and the organizations with which he works and other individuals and community organizations.* The effect of this campaign of which the current subpoena is part, has been to chill people's experience of First Amendment rights and to jeopardize the funding and existence of La Clinica and La Cooperacion. (See affidavits of Pedro Archuleta, Maria Varela, Valentina Tijerina, Henrietta Esquibel, Constancis Valdex, and Nancy Kleinbord in support of Motion to Quash.)

* Appellant was arrested in 1975 in New Mexico on federal charges which were later dismissed. Since that time the FBI has made its presence known to residents of Rio Arriba County. Appellant and other residents of the County have attested to encounters with agents engaged in a practice of periodic and repeated questioning and surveillance. (See affidavits attached to Additional Motion to Quash and Appendix O and P.) Apparently even prior to the discovery of the "bomb factory," the FBI was aware of appellant's phone calls. (See Lujan and Archuleta wiretap affidavits; Appendix D.)

On December 15, 1976, a motion to quash appellant's subpoena in Chicago was filed, alleging that the subpoena was issued for improper purposes: to harass appellant and gather information concerning political activities in New Mexico and to aid the FBI, and to interfere with protected First Amendment activities. District Judge James B. Parsons denied the motion with leave to renew it later in the proceedings. The Assistant U.S. Attorney acknowledged in open court that appellant was a target of the Chicago investigation. He asserted that the grand jury was investigating the following areas: the theft of explosives in New Mexico; the transportation of such explosives and their use in bombings which occurred in Chicago and New York for which "credit" was taken by the Fuerzas Armadas de Liberacion Nacional Puertorriquena (hereinafter F.A.L.N.); any connection with the "bomb factory" allegedly found in an apartment in Chicago leased or owned by Carlos Alberto Torres, whose whereabouts were and are unknown, and who is now under indictment.

Immediately thereafter appellant appeared before the grand jury but declined to be sworn. His refusal to take the oath was founded upon his belief that the subpoena was issued for unlawful purposes and that the grand jury had no legitimate reason to question him. During his appearance, appellant was served with another subpoena demanding his fingerprints, palmprints and photograph, to be produced that afternoon. Upon his refusal, an order was entered on December 16, 1976, requiring appellant to provide the fingerprints, palmprints and photographs

which appellant through his counsel, declined to provide. The government then moved the Court to hold appellant in contempt.

In opposition to contempt, appellant reasserted the claims made in his Motion to Quash, further asserting that the FBI already had his fingerprints, palmprints and photographs in its possession. In addition, appellant objected to his subpoena on the basis that the grand jury selection process unlawfully discriminated against Latinos. He further asserted that the subpoena was the result of illegal electronic surveillance upon himself, other prospective witnesses in Chicago and all their attorneys.

Based on appellant's challenge to the grand jury selection process, Judge Parsons ordered a full hearing. Evidence was taken in connection with the challenge. The hearing on this matter has been adjourned from time to time, and appellant's appearance before the grand jury has been stayed until resolution of the matter. At the Court's direction, appellant also submitted additional affidavits concerning illegal surveillance of him and the defense team, and is in the process of litigating his claim that he is entitled to an order requiring the government to make an exhaustive search of its investigative agencies for possible illegal wiretaps. Appellant and his counsel have been required to appear in Chicago on numerous occasions in connection with these matters.

Meanwhile back in New York, the FBI and the Assistant

United States Attorney were investigating the membership of the NCHA, because Torres had been a member. (Aff. AUSA Engle, April 14, 1977.) Two women members, Maria Cueto and Raisa Nemikin were interviewed by FBI agents on November 18 and followed by the agents to Puerto Rico on November 19. They told the agents they had seen Torres in October and didn't know where he was. The offices of the NCHA were visited regularly by the agents and records were reviewed by them. On January 10, 1977, the prosecutor "caused grand jury subpoenas to issue" to two bishops of the Episcopal Church (Appendix K; Aff. of AUSA Engle, dated February, 1977, submitted in Cueto and Nemikin), who complied, and to Maria Cueto and Raisa Nemikin who complied, but ultimately refused to testify and are now incarcerated. These subpoenas, like the ones in Chicago, were apparently issued by the prosecutor without grand jury consultation. No subpoena was yet issued to appellant, in this District, however; he was litigating his subpoena in Chicago.

As of March 29, 1977, the Northern District of Illinois (Parsons, J) was giving serious consideration to appellant's motion there to quash the subpoenas or to withhold contempt, particularly on the issues of electronic surveillance and the composition of the grand jury. Three weeks had passed since Maria Cueto and Raisa Nemikin were jailed for contempt. Upon information and belief, the Southern District prosecutor met in Chicago with the Northern District of Illinois prosecutor (Appendix L; aff. of

Margaret Ratner, April 3, 1977). On March 29, 1977, prior to a final disposition of the Chicago subpoena, appellant was served with a subpoena to appear before the Southern District Grand Jury on April 4.

In response to appellant's motion to quash this third subpoena (Chicago had issued a second subpoena for prints and photographs which the FBI already possessed by virtue of a 1975 federal arrest of appellant), the Southern District prosecutor responded in open and closed affidavits to appellant's assertion that there was an insufficient basis for these subpoenas which in quantity, geographic distribution, manner of procurement, and lack of foundation in any nexus between him and the investigation constituted harassment. The justification offered by the prosecutor in open affidavit was

Archuleta is uniquely capable of providing information to the grand jury as Torres and Lopez are not within the command of a warrant or subpoena, respectively. Cueto and Nemikin have refused to testify about the startling coincidence of persons who, on the one hand, have been associated with the Commission and, who, on the other hand, have been closely linked to terrorist bombings for the FALN.

(Aff. AUSA Engle, 4-14-77
at p. 7)

Appellant was later asked four questions in the Grand Jury, none of which had to do with the National Commission on

Hispanic Affairs of the Episcopal Church or Carlos Torres.*

In closed affidavits the prosecutor offered to show the obvious, that the Grand Jury was indeed investigating FALN bombings, which, he contended, alone justified the subpoena against appellant and appellant's jailing upon refusal to answer (gov't's memo of law in opposition to motion to quash at pp. 9, 11, 12). Judge Lasker did not look at the ex parte affidavits, but ruled without benefit of the questions asked later, that only as to the propriety of the issuance of the subpoena:

In calling a witness to testify...no intent to harass...can be inferred... since [it is] the possibility that persons who associate with each other may have knowledge about one another, which is relevant to the inquiry.

(Appendix C at pp. 26 and 27)
(emphasis added)

Judge Lasker also said that the subpoena itself "does [not] subject the witness to public obloquy particularly since grand jury proceedings are conducted in secret." (Id. at 26, emphasis added.)

2. The Law Enforcement-Media Exposition of the Uncontrollable National Investigation

While litigation of the Southern District subpoena was

* Appellant had been the New Mexico representative on the NCHA in 1972-1973, two years before Carlos Torres joined the Commission.

proceeding, on April 17, 1977, the New York Times, under the by-line of Mary Breasted, published a front page article (Appendix I), detailing the FALN investigation, describing its focus on the NCHA because of Torres' membership, the resistance of Cueto and Nemikin, a suspect who had been subpoenaed to both New York and Chicago grand juries, the use of a dog in Cueto's apartment. Information in the article was attributed to law enforcement sources, law enforcement officials, grand jury investigators, various police and federal sources, travel records of Hispanic Commission members, a Chicago law enforcement official, and travel records obtained by the FBI. The article stated,

Law enforcement officials knew the identity of no one in the FALN until the chance discovery last November by the Chicago police of what has come to be known as a "bomb factory" in the apartment rented by Mr. Torres. Since then the grand jurors have been impaneled and investigators say they are encountering various degrees of cooperation. The discovery of the Chicago "bomb factory" was the first real lead in the case.

Then followed in the article a point by point description of the government's evidence attributed to "various police and federal sources" who "told the New York Times" the whole story. Included in this layout of the government's case was the specific reference to appellant as "named in a confidential law enforcement document last November as the prime suspect in the theft of the Heron Dam dynamite which authorities believe turned up later in the FALN bombs that failed to go off." The article stated erroneously that appellant was asked to supply a voice exemplar to be compared with

tapes of reports of the bombings.

Appellant amended his motion to quash to include this outrageous treatment by law enforcement of the law of grand jury secrecy and their complete disregard for the Fifth Amendment privilege and its supposed ally, "use immunity." The prosecutor replied that there was nothing to be done, because this was a national investigation and all the various law enforcement agencies and grand juries had been trading off information across the country, although he didn't think anyone in New York did it, although he couldn't deny it, except that he "reiterated" no information in the grand jury was disclosed by New York investigators. (See Proceedings of April 22, 1977, at pp. 25-26 and 27-29; Aff. AUSA Engle, May, 1977.) This was not to say that New York investigators did not disclose facts learned in the course of their investigation, facts which, if they exist at all, the prosecutor seeks to keep secret from appellant when appellant asks the basis of any nexus between him and the bombing of Fraunces Tavern. The New York Times can know it, but not the appellant. Furthermore, law officer secrecy would seem to be necessary for facts uncovered in an investigation, as well as in Grand Jury testimony, to protect witnesses from the same obloquy. Unfounded accusation made by FBI men, whether or not based on grand jury testimony, contravenes the spirit, if not the letter, of Rule 6(e) and the right to Grand Jury indictment. But, even as to the grand jury, the prosecutor could offer no guarantees in this "national case."

There is just too many people who have worked in this investigation for it to be tightly controlled within one grand jury room.

(Proceedings 4-22-77 at p. 29)

The prosecutor himself, without authorization from any court, obtained and released to the District Court a copy of that portion of the Chicago grand jury minutes wherein appellant was apprised he was a "subject" (target) of the Chicago Grand Jury. (See aff. of AUSA Engle dated May 5, 1977, with attached Grand Jury minutes and aff. of ND Ill. AUSUA Margolis, 4-28-77, with attached minutes; Appendix M.)

The FBI, without prior authorization from, or consultation with, the prosecutor, visited Maria Cueto and Raisa Nemikin on May 10, 1977, at the Metropolitan Correctional Center. They questioned the women separately in a room without the aid of counsel and despite the protestations of the women that they did not wish to talk to the agents, that they had told the agents all they knew, and that the agents should speak with the lawyers. The women were forced to remain in the room while the agents submitted them to a description of the Fraunces Tavern bombings and the families of the deceased. (Appendix N; affs. of Cueto and Nemikin dated May 12, 1977, filed in support of Grumbles motion.)

Judge Lasker called the leaks "shameful," but the controversy on the motion to quash unripe. (Appendix C at 37-39.) He said there was no evidence that New York was the source of

the leak (just as there was no evidence it was not the source of the leak), but he ordered the United States Attorney to investigate this District and report by June 27. As of the contempt proceeding, appellant had not seen the report. Judge Lasker also asked the Attorney General to conduct a national investigation of the leak. Appellant issued subpoenas to various Justice Department officials having knowledge of these investigations but the District Court stayed them on June 29, 1977, pending legal argument at the contempt hearing. On June 30, the Court (Owen, J) held that the government law-breaking was not relevant to appellant's refusal to testify.

On the day Judge Lasker rendered his opinion, Special Agent Martin Crowe of the FBI,* who had been supervisor of the New York FALN investigation was replaced by Special Agent Christopher Morrison (Appendix E, affs. of Morrison and Crowe).

Judge Brieant issued an order on June 17, that all persons mentioned in Rule 6 of the Rules of Criminal Procedure and all persons helping any Assistant U.S. Attorney on this case are expressly ordered and enjoined that they may not deliver, directly or indirectly, orally or by writing or by any other means, any testimony given by this witness to the grand jury to any unauthorized person, including but not limited to other agents or employees or any persons working in capacity with or for the Federal Bureau of Investigation, or the federal, state or local law en-

* Subpoenaed by appellant, but appearance stayed and then rendered moot by Court's order of contempt.

forcement agencies of any kind, beyond those persons who are listed by title in Rule 6(d) of the Federal Rules of Criminal Procedure or whose names are set forth on Government's Exhibit 1, on this hearing.* I will also direct that the grand jury testimony or evidence relating to the movant presented to the Special 1975 Grand Jury for the Northern District of Illinois cannot be presented to this grand jury, and that includes his own testimony given there....

(Proceedings 6-17-77 at
pp. 117-118)

At the same time, Judge Briant refused to order certification of the government's evidence against appellant. At the same time the Court reserved to appellant further objection to the questions asked if those questions should relate to the Chicago inquiry. On information and belief the questions posed here are substantially the same as those posed in Chicago and concern subjects for which appellant is sought to be prosecuted in Chicago.

3. Appellant's Attempt to Obtain a Realistic Electronics Surveillance Check

On June 14, Judge Lasker rendered a separate opinion on appellant's motion to quash based on illegal eavesdropping (Appendix F). The facts asserted by appellant are recited in that opinion which, although it withheld as unripe an ultimate

* J. Wallace La Prade, Assistant Director FBI; Special Agent in charge Edward Foley, Agents Ronald W. Betkiewicz, Louis J. Vizi, Christopher Morrison, Donald Wofford, Thomas J. Terjeson.

adjudication of the claim, stated,

Where the government does not admit illegal wiretapping, it is difficult to imagine how a movant can do better than make the colorable showing of possible illegal electronic surveillance that has been made here.

P. 5

Appellant made his eavesdropping claims at the motion to quash stage of the proceedings, because the prosecutor requested it to

allow[ing] the government sufficient time to make a full and complete agency check... so that when the time arrives for adjudication of the claim, the government can be prepared with appropriate and complete responses.

(Appendix F at p. 12)

Judge Lasker opined that since the government was concerned about the time and adequacy of a response, he would give his views:

...the affidavits submitted by Archuleta and the nature of the investigation of which he is a part as revealed in earlier papers filed with the court suggest that an appropriate government response should include either denial or affirmance of electronic surveillance in New Mexico (which may have directly or indirectly provided federal officials with information forming the basis either for the subpoena or specific questions), together with appropriate affidavits from officials in those localities in which specific claims supporting an inference of wiretapping have been made.

(Id. at p. 12)

The prosecutor has refused to do that because he

believes himself empowered to dismiss Judge Lasker's opinion as "without support in the law" (gov't memo in support of order to show cause at p. 6n. 2). The prosecutor is less than candid when he asserts that Judge Brieant "explicitly" held, after the immunity grant was signed by him, that no New Mexico eavesdropping check was necessary (Id. at 7n.). The prosecutor contradicts himself in the same memorandum when he says that Judge Brieant "indirectly" held the government denials sufficient when he ordered defendant to testify after the immunity order was signed (Id. at 6). In fact, what happened was that Judge Brieant, without a review of any of the eavesdropping papers in the case or Judge Lasker's opinion, ordered defendant to testify on the basis of the use immunity order he had just signed and reserved all the issues to the contempt proceedings.

I think it goes without saying that, in dealing with such application, if made, any of these issues and questions can be raised. But right now I am directing him to go in there immediately and answer the questions.

(Proceedings 6-17-77 at p. 142)

The government's denials are indeed insufficient, not only with respect to New Mexico law enforcement authorities who are the most obvious and immediate probable eavesdroppers on appellant and the medical-legal services organization in Tierra Amarilla which have been the target of other Constitutionally

violative oppressive police tactics in recent years (Appendix O and P),* but the FBI and prosecutor denials are superficial and pro forma in themselves.

Affidavits from Special Agent John Smythe, the electronics surveillance index supervisor, were submitted. These affidavits stated that the FBI index did not show eavesdropping on certain named individuals and addresses (Appendix E). However, the index was only checked as far back as October, 1976, or in the case of attorney Doris Peterson as of March 28, 1977. No telephone numbers submitted by defendant were checked. In proceedings in In Re Subpoenas of Jay Werner and Philip Shinnick, Nos. 4636, 4643, U.S.D.C. Md. Pa, September 9 and 23, 1976 (Nealson, J; Appendix Q), Agent Smythe ** testified that the FBI central index includes only full names of persons, dates of overhear and field office source (Appendix Q at 60-64, 75); that the index depends on field office cooperation in sending to headquarters the full names or first and suspected last names of individuals overheard and that the field offices don't always do that (64, 75, 80); that there is no topical listing in the ELSUR

* And see the prosecutor's affidavit in support of the contempt order in which he admits that appellant was physically surveilled at a rally in New Mexico, and the Albuquerque Journal, March 12, 1977 (Appendix I) which states that John Kyner of the Albuquerque police bomb unit "knows" about the FALN investigation.

** Subpoenaed by appellant, but appearance stayed and then rendered moot by Court's order of contempt.

(electronic surveillance) index (66), although such a listing by code name does appear in the general investigations index (67-71, 73); that ELSUR would not list a first name overheard if the last name was not known or suspected by the overhearing field office or not sent in by them (72, 80, 64, 75); that only FBI conducted taps are listed (65-66); that he would have no way of knowing if other agencies, state, local or otherwise, had provided information derived from taps to the FBI, although a headquarters response to a tap search request always includes the caveat, "It is suggested that you contact any other federal agencies to determine if they have conducted any electronic surveillance" (101-102); that the field offices have the only index of individual numbers tapped through that particular office, and headquarters has no national index of numbers (89, 180); and that field offices would have case files indicating if other agencies had provided ELSUR derived information to the FBI (187). There is no indication in this case that a field office check of the telephone numbers, or of other agencies, or of last names or that a general investigation index check was made. The government has resisted a New Mexico check suggested by Judge Lasker (supra). The affidavit from the New York field office, signed by Agent Martin Crowe, states that a New York field office check was made; it reports, however, only the results of the Washington headquarters search conducted by Agent Smythe and concludes no surveillance on the basis of the Smythe affidavits. Agent Steven Braus, of the New York

field office, also averred that his office was requested to check but that in response he would rely on the Washington headquarters affidavits of Agent Smythe. Despite the fact that the New York Police Department is a law enforcement agency obviously involved in bombings in this City and invested with ELSUR capability, no check was made there. Despite the fact that the Bureau of Alcohol, Tobacco and Firearms is generally used as the forensic investigative arm of the FBI and other federal governmental agencies, no check was made there.

The personal denials of the prosecutor are insufficient since, even Agent Smythe who has records, cannot say whether information from ELSUR has been provided to the FBI by other agencies or even by FBI field offices, and since individuals may not know that ELSUR sources originated information in this case, and given the nature of FBI independence demonstrated in other aspects of this investigation, the prosecutor and single agent denials of personal knowledge are inadequate.* One wonders whether the recently uncovered illegal tapping of "activists" by the Connecticut

* At the contempt hearing, the prosecutor said he had just heard from FBI Agent Butkiewicz, who had been sitting with the prosecutor at counsel table, that FBI field offices were checked in New York, Albuquerque, and Chicago. (Proceedings 6-30-77 at p. 52.) We do not know what kind of checks were made there or the results. If the Crowe and Braus affidavits are an example, these field offices also relied on Washington's denials. Agent Butkiewicz never submitted an affidavit, even though New Mexico and Chicago ELSUR was vigorously argued all along in this case, nor could he have averred since he probably had nothing to do with the Chicago and Albuquerque checks; in any case, this information, through the multiple hearsay comment of the prosecutor without any identification of the person making these field office checks, is not adequate under the law.

police with FBI sponsorship and participation appears on Mr. Smythe's index. Two of the FBI agents involved there are, according to the New York Times, 7-7-77, resisting their own subpoenas to testify about the illegal tapping.

The Chicago Grand Jury subpoena litigation on the ELSUR issue is not finished. The Court there sought further affidavits from movants; the Doris Peterson and Mary Lujan affidavits, relied on by appellant here and by Judge Lasker in his opinion, had not been furnished the Northern District of Illinois when the proceedings were adjourned on February 23, 1977. The Court there stated

Now, I think that under the circumstances you may want to take further time to see if you can amend your position with further affidavits of some more - what was the phrase I used - some more technical sophistication...I am obligated to give movants sufficient time to file further affidavits for this...I think the grand jury should continue its work the best it can. Since they have other subpoenas, why, we will hear those matters as they come up.

(In the Matter of Subpoenas
of Lopez, Archuleta, et. al.,
No. 76GJ1128 ND Ill. (Parsons,
J, at 12, 13, 14) (Appendix R)

4. Unexercised Grand Jury Incarceration Discretion and the Composition Challenge

On June 17, 1977, Judge Brieant instructed the Grand Jurors,

...the United States Attorney or his Assistants...may point out to you the laws which the the Government charges or contends have been violated and will subpoena witnesses for you at your request.

(Proceedings at p. 47)

If the Judge finds that the witness is in contempt, you will then have to determine further as a matter of judicial discretion whether the witness' testimony should be coerced or compelled by means of imprisonment...Thus, I urge you, before you request that any witness be cited for contempt or compelled to answer, that you carefully consider the consequences of your action and exercise that independent judgment which is the responsibility of each and every one of you as grand jurors under your oath in connection with your duties regarding the administration of justice.

(Proceedings at p. 51)

On that same day, however, after appellant refused to answer, notwithstanding the immunity grant, Judge Brieant asked the foreman only,

is it the consensus of the grand jurors that the answers to these questions obtained from this witness are reasonably necessary and proper for the purposes of the Grand Jury's work?

(Proceedings at p. 135)

The Grand Jurors were not instructed on some standard, a reasonable basis, for calling witnesses and subjecting them to the coercive power of the subpoena and contempt, nor were they asked by the Judge in this case whether or not a nexus for this witness existed and whether or not (as per the instructions given), "the witness' testimony should be coerced or compelled by means of imprisonment." As the prosecutor slipped in the Grand Jury room, he indicated the true nature of these proceedings: "I'll direct the Foreman to - or ask the Foreman, rather - to direct you to answer those questions." (Appendix H at p. 9; minutes of Grand Jury proceedings on 6-17-77.)

This Grand Jury was instructed that they had the discretion to call for appellant's imprisonment should he refuse to testify, and they have called for his imprisonment. Thus arises appellant's standing to challenge the underrepresentation in the Grand Jury pools in this District of the class of Spanish people and the exclusion of individual members of that class for reasons of their Spanish origin. Appellant has asked for and been denied access to the jury lists, pools and/or wheels and questionnaires for this District that were used in the selection of this and its predecessor Grand Jury. He was denied these because,

...the issue is not yet ripe for decision. The witness has not even been sworn, nor is he yet in any present danger of contempt. To permit disruption of the grand jury is surely not warranted until and unless the witness is actually placed in jeopardy by virtue of the government actions.

(Lasker, J; Appendix C at p. 21)

The issue became ripe at the contempt proceedings and appellant moved again for the jury selection information under 28 U.S.C. §1861 et. seq. and under his Fifth, Sixth and Fourteenth Amendment rights to due process and equal protection of the law and the right to effective assistance of counsel. These were denied him as was his right to challenge. It is practically impossible to mount an effective challenge to jury selection procedure and composition without access to these materials; the comparable materials in the Northern District of Illinois were provided to appellant in order to enable him to mount his challenge in that District. On July 5, 1977, the Chicago challenge was there rejected on the merits after a hearing on the substance of the

issue of underrepresentation.

Although, we submit, neither 28 U.S.C. §1861 et. seq. nor the Constitution requires a prima facie showing of underrepresentation before the data in government possession upon which such a showing would be made is released to a citizen challenger, appellant submitted three affidavits of preliminary statistics. They indicate an approximate Spanish population in the Southern District of 15%. An affidavit of Louis Biancone filed in the case of United States v. Rodriguez, 75 Cr. 750 and dated October 1975 shows, that as to jury pools in July, 1975 released to appellant in that case, an underrepresentation of Spanish people of approximately 45%. It should be noted that the National Commission on Hispanic Affairs of the Episcopal Church, the apparent target of this Grand Jury, has Puerto Rican and Chicano members and members from all regions of the country where there is a high concentration of Spanish-speaking peoples. In addition to work in this country for Spanish people the NCHA has appealed for funds for earthquake-ravaged Guatemala.

5. The Contempt Proceedings

At the request of appellant in defense of the order to show cause why he shouldn't be held in contempt, subpoenas were issued to several members of the Justice Department and the FBI.*

* FBI Agent John Smythe, supervisor of the electronics surveillance index in Washington; Agent Martin Crowe, former supervisor of the New York FBI FALN investigation, relieved on the day of Judge Lasker's opinion; Agent Wallace La Prada, Assistant Director, New York FBI; Robert Fiske, USA SDNY, ordered by Judge

On June 29, the day before the contempt hearing, and prior to the filing of appellant's papers in defense, the government moved to stay the subpoenas. The Court granted the motion pending its review of the defense papers and oral argument. On June 30, 1977, Judge Owen heard argument.

Judge Lasker had written two lengthy opinions on the issues raised by appellant and had left them open for renewal at the contempt proceedings. Judge Brieant had granted in part appellant's applications for re-instruction of the grand jury and a protective order, and opined,

Whether he testifies or not, or whether he has a present subjective intention to testify or not, in my view is not relevant to this particular motion I am hearing now. I believe that this witness is seeking in a perfectly orderly manner to litigate certain rights which he or his attorney believe he has. So far, all of the proceedings conducted before me appear to have been conducted in good faith and in accordance with the traditions of the bar of this court and elsewhere.

(Proceedings 6-17-77 at p. 108)

Judge Owen took a different view:

I see here a pattern of continuing obstruction by every conceivable device available to skillful and resourceful counsel. For three months the government has been denied the right to the legitimate testimony of one of its citizens.

(Proceedings 6-30-77 at p. 67)

Lasker to investigate the media exposé; Michael Shaheen, Justice Department national "leaks" investigator; AUSA Jeremy Margolis, ND Ill., who conducts the Chicago grand jury and has conferred with AUSA Engle.

He thought that the tap checks were "thorough," that the government has "a perfect right to go through the members of that group on the expectation that with one of them they will come upon the person they believe exists," that appellant had no standing to make a composition challenge, and that "just because there were leaks," is not reason to refuse to testify. (Id. at pp 67-68)

Appellant addressed the Court:

Ever since the United States went into the southwest, my people, Chicano, who is a half-breed of the Indians, has been forced...to live in bunched up communities because when the white men went to the southwest, he saw open land, range land, claimed it, fenced it and told us that we didn't have a right to it....

(Id. at p. 74)

The FBI - from local law-enforcement agencies to the FBI - have kept an eye on me, watching me. I'm only involved in an organization that is doing, you know, good for the people, that the people want, anything to help the people. The FBI keep on watching me.

(Id. at p. 78)

I'm not going to be labeled a stoolie by anybody in my community. I want to be accepted in my community. I'm proud of working in my community...Whatever time I have to spend in jail, I will spend it...Is the government or you, your Honor, going to benefit out of putting me in jail, seeing me in jail, making my family suffer, making my community suffer?

(Id. at 79)

...my price is my price and I'm part of a struggle. I know there is a lot more struggles going on that the FBI and the government has been trying to squash...

that's the very reason this grand jury investigation is going in the Puerto Rican movement for liberation and now extended to Chicano movement in the southwest...you can leave me in there and throw the keys away.

(Id. at 80)

The Court ordered appellant incarcerated at approximately 6 p.m. on June 30 and denied a stay pending appeal and an overnight stay pending application to this Court and bail.

Appellant sought an order that the Marshals refrain from booking and fingerprinting appellant on this civil contempt, especially since these same items are the subjects of subpoena litigation in Chicago. The Court refused such an order; but did order "whatever is customary in civil proceedings." (Id. at p. 85).

Counsel advised the Marshals that appellant should not be fingerprinted or otherwise booked, but they did it nonetheless.

On July 5, 1977, the District Court for the Northern District of Illinois (Parson, J) denied on the merits appellant's challenge in Chicago to the grand jury array, and reserved decision on the issue of abuse of the grand jury pending the Court's own in camera review of the grand jury minutes. The Court made no ruling on electronics surveillance, but set July 20 as a hearing on the further matters left open.

ARGUMENT

POINT I

APPELLANT HAS BEEN DEPRIVED OF THE CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, FREEDOM OF SPEECH AND ASSEMBLY, GRAND JURY INDICTMENT AND SECRECY, AND THE PRIVILEGE AGAINST SELF INCRIMINATION BY HIS INCARCERATION FOR REFUSAL TO ANSWER QUESTIONS POSED BY A PROSECUTOR UNRELATED TO THE STATED PURPOSE OF A SUBPOENA, WHICH ITSELF VIOLATES SPEECH AND ASSEMBLY FREEDOMS, WITHOUT A SHOWING TO THE COURT AND GRAND JURY OF ANY NEXUS BETWEEN THE WITNESS AND THE SUBJECT OF THE QUESTIONS, WITHOUT THE INFORMED PARTICIPATION OF THE GRAND JURY UNDER WHOSE POWER THE COMPULSION HAS BEEN EXERCISED, AND GIVEN THE DUAL GRAND JURY TARGET - WITNESS SYSTEM BEING ABUSED UNDER THE CIRCUMSTANCES OF THIS CASE.

The facts in this case constitute a process of prosecutor-FBI directed compulsion of testimonial information from a named "target" of their investigation who has otherwise refused to cooperate, who has been asked questions unrelated to the asserted purpose of his subpoena in New York (according to the prosecutor, information about the National Commission on Hispanic Affairs of the Episcopal Church and the whereabouts of Carlos Torres*), who has not been shown to have any connection whatever

* Since religion, speech and assembly are presumptively protected by the First Amendment, the purpose of the subpoena is itself violative of Constitutional rights unless the prosecutor shows the immediate and substantial subject matter of the investigation, the connection between the witness and the answers sought and that the information cannot be obtained by less drastic means. At least the latter two requirements have not been met in this case. NAACP v. Alabama, 357 US 449 (1958); Bursey v. United

to the bombing of Fraunces Tavern about which he was questioned, or to Carlos Torres and who was subpoenaed to New York from New Mexico only after a grand jury subpoena in Chicago was placed in jeopardy by Constitutional challenges there.* The history of this case shows that grand juries were impanelled (in New York) and reactivated (in Chicago) only after new leads were discovered in the investigation, for the purpose of being used as passive repositories of executive investigatory compulsion of testimony related to those leads - the grand jurors in both jurisdictions were impanelled to enable compulsory process by the prosecutor, and they were not participants, we submit, in the issuance of the instant subpoenas, the questions posed, or the decision to compel testimony by imprisonment of an unconnected witness. The government prosecutor is conducting investigation by coercion, the grand jury subpoena power providing the central investigative technique in this case, and, indeed, in the

States, 466 F.2d 1059 (9th Cir. 1972); Gibson v. Florida Legislative Investigative Committee, 372 U.S. 539 (1963). Furthermore, the subpoena power cannot be used to perform the investigative (executive) function of finding a fugitive. Hoffman v. United States, 341 U.S. 479 (1951); Application of United Electrical Radio and Machine Workers, 11 F. Supp. 858, 856-65 (SDNY 1953) (Weinfeld, J).

* All of these facts distinguish this case from that of In the Matter of Cueto and Nemikin, decided by this Court on March 29, 1977. The women were not targets, had not been served simultaneous subpoenas to two grand juries thousands of miles apart and thousands of miles from their homes, and they had admitted seeing Carlos Torres.

government's entire modus operandi in recent years. The Fifth Amendment privilege, designed to guard against Inquisition, has been removed, so that the government may compel a society of informants on threat of imprisonment. Without judicially imposed limits, the government intrudes in the lives of any group of people and upon individuals against whom it has suspicions or regards as enemies, and the freedoms of speech and assembly and religion are chilled beyond recognition. 7 Harvard Civil Rights-Civil Liberties Law Review, 432 (1972).

The historic role of the grand jury so often invoked in name has been subverted here, not only by its demotion to a post-facto receptor of prosecutor directed subpoena power, but also by the release by federal law enforcement authorities and grand jury investigators to the press of the results of the investigation supposedly protected by that historic body and by the Fifth Amendment privileges to grand jury indictment and against self-incrimination. The prosecutor here argues to the Court that he can't control this investigation and confine it to the grand jury room and that appellant can't complain of publicity, because he spoke at a rally in New Mexico. Appellant does not complain of publicity; he complains about the publicity of matters subject to Constitutional and statutory rules of secrecy and contained solely in the hands of the very authorities seeking to invoke the processes they have abused.

There is no doubt that this Court has the Constitutional

obligation to supervise the grand jury (United States v. Caldwell, 92 S. Ct. 2646; Wood v. Georgia, infra; Hoffman v. United States, infra.), and that if, as asserted here, the grand jury is not actually the operative body behind the subpoena power, or if witnesses are being called to answer and to face imprisonment without even the barest showing of the relevance of the particular witness to the inquiry, there is no justification for the contempt citation and the witness has just cause to refuse.

stigmatization of [appellant which is] part of an overall governmental tactic directed against disfavored persons and groups. Visiting opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as extra-judicial punishment [footnote omitted] or to chill their expressions and associations, is not a governmental interest that we can accept or consider. It would circumvent the adversary process which is at the heart of our criminal justice system and of the relationship between government and citizen under our constitutional system. It would be intolerable to our society.

United States v. Briggs,
514 F.2d 794 (5th Cir. 1975)

See United States v. Doe, 457 F.2d 895 (2nd Cir. 1972); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); and In Re Schofield, 486 F.2d 85 (3rd Cir. 1973) and 507 F.2d 963 (3rd Cir. 1975). The "powers" of the grand jury are not unlimited and are subject to the supervision of a judge" Branzburg v. Hayes, 408 US 655, 688 (1972) and "a grand jury subpoena is not some talisman that dissolves all constitutional protections." United States v. Dionisio, 410 U.S. 1, 11 (1973). The court's supervisory duty

not only exists "but is imposed upon the court to see that its grand jury and its processes are not abused, or used for purposes of oppression and injustice." In Re National Window Glass Workers, 287 F. 219, 225 (ND Ohio, 1922).

This Court has supervisory power over the questioning of particular witnesses when the prosecutor does not show some reasonable nexus to the questions posed or the subject of the investigation. This Circuit has said in commenting on one instance of abuse of the subpoena power in the calling of a particular witness,

...before issuance of the grand jury subpoena upon Doe (which was later withdrawn), at least some further slight investigation would have been appropriate. A grand jury is not a prosecutor's plaything and the awesome power of the Government should be used deliberately, not in haste, and without unwarranted or idle threats, direct or implied.

In the Matter of the Grand Jury Subpoena Served on John Doe, 76-1406, decided 12-9-76, slip. op. at 872.

Other cases have struck down, or regulated, or indicated the power to regulate the compulsion of testimony from certain witnesses on grounds of abuse of official power in the absence of "any showing of meaningful relationship" between that particular witness and the investigation. Gibson v. Florida Legislative Investigation Committee, supra, at 898; Wood v. Georgia, 370 U.S. 375 (1962); In Re Stolar, 397 F. Supp. 520 (SDNY, 1975) (Pierce, J); In Re National Window Glass Workers, 287 F. 219 (DCND Ohio, 1922); Brown v. United States, 245 F.2d 549 (8th

Cir., 1957); Hoffman v. United States, 341 U.S. 479 (1951); In Re Grand Jury Proceedings (Schofield), 507 F.2d 963 (3rd Cir. 1975); In Re Grand Jury Proceedings, Vito N. Pisciotta, No. 75-382 (ED Pa, Jan. 20, 1976) (Van Artsdaken, J) (Ct. withholds contempt against convicted defendant subpoenaed to Grand Jury to testify while appeal and post trial motions are pending). United States v. Thayer, 214 F.Supp. 929 (Colo, 1963); United States v. Icardi, 140 F.Supp. 383 (DC, 1956). In United States v. Mandujano, 96 S. Ct. 1768, at 1785 (1976), the concurrers cite Hooley v. United States, 209 F.2d 234, 235 (1st Cir. 1954); United States v. Pepe, 367 F.Supp. 1365, 1367, 1370 (Conn. 1973); United States v. Garnes, 156 F.Supp. 467, 469 (1957) aff'd 258 F.2d 530 (2d Cir. 1958) cert. den. 359 U.S. 937 for the proposition,

It cannot be gainsaid that prosecutors often do call before grand juries persons suspected of criminal activity to testify concerning that activity...and the availability of this device has often been fatally tempting to those aware of its potential for abuse.

The case relied on by the prosecutor, United States v. Doe, 457 F.2d 895 (2d Cir. 1972), is inapposite because the Circuit specifically did not decide there the issue of reasonable basis for testimonial compulsion, 457 F.2d at 900, holding only with respect to personal and public physical characteristics that the Fourth and Fifth Amendments did not apply. That case is further distinguished by the issues raised here, and not there, of an "investigation so sweeping in scope and indiscriminate in character" (Id) as to call into action the Constitutional pro-

tections violated here, and by the facts here of violation of Grand Jury secrecy and reversal of the Grand Jury system of "Court process rather than constable's intruding hand" upon which Judge Friendly relied in Doe, supra, as safeguards against abusive grand jury inquisition.

Judge Brieant instructed the grand jurors in this case, albeit too late, that they determine whether a witness should be called and/or held for incarceration upon refusal to answer. The Supreme Court in United States v. Mandujano, 96 S. Ct. 1768, 1774 (1976), says, "When called by the grand jury, witnesses are thus legally bound to give testimony...." (emphasis added)

If the witness interposes his privilege, the grand jury has two choices.

(Id. at p. 1776)

Indeed, one of the reasons for the Court's holding that Miranda warnings were not required in the grand jury room, was that the grand jury was not a police or prosecutorial intimidation setting due to the presence of "impartial observers to guard against intimidation or trickery" (Id. at p. 1778). The problem, of course, is that the system has reached a stage where there is a complete erosion of the powers of the buffer jurors, and the emergence of the prosecutor as the sole inquisitor with the power to jail whomever doesn't talk to him.

in condoning resort to such tactics the courts become partners in 'undermin[ing]' the 'adversary system of criminal justice' by allowing prosecutors 'deliberately [to seek] to avoid the burdens of independent

investigation by compelling self-incriminating disclosures' Garner v. United States, 96 S. Ct., 47 L. Ed 2d 370, 378 (1976). Such tactics by prosecutors are exemplars of the very evils sought to be prevented by the enshrinement of the Fifth Amendment privilege in the Constitution. In giving those tactics our stamp of approval we turn our backs on our recognition heretofore that it is crucial that courts 'be "alert to repress" any abuses of the investigatory power invoked, bearing in mind that..."the most valuable function of the grand jury...[has been] not only to examine into the commission of crimes, but to stand between the prosecutor and accused"' Hoffman v. United States, 341 U.S. 479, 485 (1951)

Mandujano, supra, at 1786-87
(concurring opinion)

The abuse in this case goes beyond the failure of grand jury participation and the failure of exercise of an informed discretion. Here a witness was subpoenaed and asked practically the same directly incriminating questions posed by a companion grand jury before whom he is a target, notwithstanding the prosecutor's representation that here he is being questioned about the NCHA because Torres has flown and Cueto and Nemikin are imprisoned, and despite the absence of any showing whatsoever that would permit this man to be asked if he had been the source of the dynamite used in the Fraunces Tavern bombings. The prosecutor has offered to show some materials in camera, but these, he has said, justify the questioning of defendant because the grand jury is investigating bombings. This still does not legitimize the prosecutor's inquisition of this witness in what

may otherwise be a legitimate general subject matter for investigation.*

Thus, the incriminating questioning here of an unimmunized target before another grand jury that apparently makes his indictment offend the mandates of United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976); United States v. Goldberg, 472 F.2d 513, 516 (2d Cir. 1973); United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. Dornau, 359 F.Supp. 684 (SDNY, 1973), and the value of use immunity here and a protective order here should carry little weight given the wholesale disclosures made by the government to the press despite Rules 6(e) and (d) FR Crim. P., the Fifth Amendment, and 18 U.S.C. §6002. (See Point II, infra).

The circumstances of the instant case demonstrate the abusiveness of the government's actions which require appellant and his counsel to prepare for and simultaneously litigate identical and related legal issues in two jurisdictions. Appellant has faced contempt citations in two districts. The government here was already aware of appellant's refusal to testify on a variety

* Appellant submits that he, as well as the Court, should have access to these materials, given the exposure by law enforcement authorities to the New York Times of the so-called "confidential law enforcement memoranda," and the right of a defendant in an adversarial system to evidence to be used against him. Alderman v. United States, 394 U.S. 165; United States v. United States District Court, 407 U.S. 297 (1972); United States v. Coplon, 185 F.2d 629, 639 (2d Cir. 1950); Dennis v. United States, 384 U.S. 855, 873, 875.

of grounds before the grand jury in Chicago, which, by itself, suggests that the subpoena to New York of a political dissident, knowing that he has already refused to testify, constitutes an abuse of process. The purpose and effect of subpoenaing appellant to multiple grand juries, accompanied by the improper release of information to the press much of it untrue and in violation of Rule 6(e) of the Federal Rules of Criminal Procedure, are to label appellant and the Chicano and other Hispanic Movements as terrorists.

In United States v. American Honda Motor Company, 273

F.Supp. 810 (ND Ill, ED 1967) the Court recognized that

...successive Grand Jury inquiries and indictments for alleged separate conspiracies arising out of the same transactions may, and in this situation do, constitute harassment in violation of the due process provision of the Fifth Amendment which provision, as explained by Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General, 341 U.S. 123, 71 S. Ct. 624, 95 L.ED 817 (1951), is essentially a recognition of the requirement of fundamental fairness and fair play under a given set of circumstances.

* * *

...there is no reason why Honda would not face further repetition of the subpoena process over and over again.

This is precisely the sort of harassment which fundamental fairness and the due process clause prohibit. The Government is not a ringmaster for whom individuals and corporations must jump through the hoop at their own expense each time it commands. 273 F.Supp. at 819, 820.

The possibility that manipulation of the situs for a grand jury investigation may be a method of grand jury

abuse has been recognized, Hawthorne Inc. v. Director of IRS, 406 F.Supp. 1098, fn. 29 at 115 (ED Pa. 1976), and the general rule in the federal courts, we submit, is to prohibit simultaneous litigation in multiple forms, even absent manipulative abuse. Colorado River Water Conservation District v. United States, 96 S. Ct. 1236 (1976); Commerce v. Cablewave, 412 F.Supp. 204, 207 (SDNY. 1976); Coakley and Booth v. Baltimore Contractors, 367 F.2d 151 (2d Cir. 1966); In Re National Window Workers, supra; Hypra Inc. v. Seeger-Wanner Corp., 292 F.Supp. 342, 345 (D. Minn. 1968); Landis v. North American Co., 299 U.S. 248 (1934); Universal Gypsum of Georgia v. American Cyanamid, 390 F.Supp. 827 (SDNY 1975).

Furthermore, the problem of abuse of the power of nationwide service of process inspired the first Congressional hearings on grand jury abuse since the institution of the grand jury system in North American law in Massachusetts in 1634. These hearings, begun in March 1973, focused on subpoenas served on five Irish residents of New York to a grand jury in Ft. Worth, Texas. Hearings before Subcommittee No. I of the Committee on the Judiciary House of Representatives, Ninety Third Congress on Grand Jury Venue.

In his testimony Sen. Edward Kennedy criticised abuse of the prosecutor's power to select virtually any jurisdiction and require witnesses to appear there. He condemned the venue shopping and harassment apparent in that case. Kennedy asked "what possible justification exists for separating these men from

their homes and families and friends and jobs in New York, and hauling them 1400 miles to Texas, to appear before an alien grand jury and a hostile prosecutor?"

(Id. at p. 30)

Largely as a result of the abuses exposed by this testimony, a number of bills have been introduced into Congress in an effort to prevent prosecution abuse of the grand jury process, including manipulation of situs. Presently pending before the 95th Congress are HR 3736, Hr 94, HR,2620, HR 844, and HR 806.

That there was manipulative abuse of situs in this case is evident from the facts gleaned from all the papers filed in the case, but, in addition, appellant subpoenaed material witnesses and was prepared to examine them on this subject and the other issues of electronics surveillance, the disregard of investigative and grand jury secrecy, the validity of the protective order, and the abuse of process. The District Court declined to hear them. Should this Court hold further inquiry necessary, appellant preserved his right to an evidentiary hearing and an examination of these witnesses.

POINT II

A WITNESS WHO IS THE TARGET OF AN INVESTIGATION IN ONE JURISDICTION HAS GOOD CAUSE FOR REFUSING TO TESTIFY, FOLLOWING A GRANT OF USE IMMUNITY IN ANOTHER, WHERE THERE IS A REAL DANGER THAT HE MAY BE INDICTED AS A RESULT OF THAT TESTIMONY.

I. The Immunity Granted In This
Case Is Not Co-extensive With
The Witness' Fifth Amendment
Privilege

The Government has in effect conceded here that the Chicago and New York grand juries are investigating "a national case," an alleged conspiracy, whose overt acts took place in more than one United States District and State jurisdiction, and that there is a trade-off of information. Obviously the information will have to be pooled, for it is clear that only one prosecution for this conspiracy could be brought in only one of the Districts. It is inconceivable that in such an investigation, where

there is must too many people who have worked in this investigation for it to be tightly controlled within one grand jury room.

(AUSA Engle. Proceedings 4-22-77,
supra, at p. 29),

that appellant's theoretically immunized testimony in New York would not be "used" in some way,

in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.

(United States v. McDaniel,
482 F.2d 305 (8th Cir. 1973))

over and above the improper "use" of the investigation already demonstrated by the government-inspired prosecution in the press.

Ordinarily, immunity conferred pursuant to 18 U.S.C. 6002 et. seq. is presumed co-extensive with a witness' Fifth

Amendment privilege. The unique facts of this case remove it from the class of ordinary cases, and require close scrutiny by a court asked to review an order that committed appellant pursuant to 18 U.S.C. §1826(b). Appellant is in the unique position of having been directed to answer questions in this District which are closely related to those asked in a district where he is the target of a related grand jury investigation.

A witness has just cause for refusing to testify if the immunity granted is not, in fact, co-extensive with his or her right to be free from compulsory self-incrimination. Kastigar v. United States, 406 U.S. 441 (1972) interpreted Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) as "overturning the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction." 406 U.S. at 463-464. The Kastigar holding that use immunity was sufficiently co-extensive with the Fifth Amendment privilege premised a negation of the concession made by the United States Attorney here,

The statute's prohibition will prove impossible to enforce.

406 U.S. 459-460.

Once the Government admits that in this particular case, the immunity grant is an empty exercise and the facts and circumstances of this case take it out of the Kastigar ambit, then the use immunity grant is no longer co-extensive with appellant's privilege.

The government argued that the Courts should do nothing because it could do nothing, citing United States v. Capra, 501 F.2d 267 (2d Cir. 1974) for the proposition that the Court:

could fashion no appropriate remedy even though he deplored the use of photographers and press people at the time of an arrest.

(Minutes of 4-22-77 at p. 28)

The government misreads that case, asking this Court, in effect, to:

forgive the requirements of the Constitution in the name of law enforcement.

(Berger v. New York,
388 U.S. 41 (1967))

In fact, the government in Capra agreed that such activities would never happen again; the defendants there had not been prejudiced, and the Court was dealing with a post facto situation. Here, the prejudice to appellant is imminent and grave; the government has made the representation that the evil in question is uncontrollable; the Court has the power and the remedy available.

The fear of prosecution subsequent to the giving of immunized testimony is not chimerical, especially in a case such as this involving a wide-ranging investigation characterized by the government as national in scope. See, e.g. United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976). The fact that appellant has already been told that he is the target of a grand jury which has asked at least one question almost identical to one asked here distinguishes this case from those in which the threat of

subsequent prosecution was fanciful or insubstantial. See, e.g., Zicarelli v. New Jersey Investigating Commission, 406 U.S. 472 (1972); In Re Tierney, 465 F.2d 806 (5th Cir. 1972).*

Were the government to conduct a single grand jury investigation in either New York or Chicago, immunize the witness and compel him to testify and later indict him, it would face an almost insuperable burden of denying any "use" of the testimony. United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976). Prohibited use would include rereading or summarizing the grand jury testimony (543 F.2d at 1009). It may even include a repetition of highly prejudicial questions from which grand jurors could draw inferences of guilt. (See, e.g., United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973,))

The effect of the government's choice to proceed against this witness as a target in one jurisdiction and an immunized witness in another at the same time is to circumvent the "heavy burden" imposed by Kastigar. That burden must be met before the government can proceed with a prosecution, and the government must show that the subsequent prosecution is entirely derived from "legitimate independent sources" 406 U.S. at 462. This burden would indeed become "illusory." (See concurring opinion

* The third question appellant refused to answer is either badly phrased or a perjury trap, because appellant may know many people but not know if any one of them was responsible for the Fraunces Tavern bombing. But if he answers "no" and someone he knows later is determined to have been responsible, he might be liable to a charge of lying. This illustrates one very real danger to a "target," whom the government will seek to incarcerate one way or the other. It is the government who makes the discretionary decision to indict.

of Judge Oakes in United States v. Goldberg, 472 F.2d 513, 516 (2d Cir. 1973) if the government were permitted to compel testimony under a grant of immunity in this jurisdiction.

The problem of concurrent subpoenas when the witness is a target in one jurisdiction and immunized witness in another is exacerbated in this case by the unprecedented disclosure by "government sources" of confidential information about the witness/target. The government has admitted that it is unable to know, much less control, the flow of information - accurate and grossly inaccurate - in regard to this case. (See, e.g., Mr. Engle's denial that he knew agents of the FBI had visited Mss. Cueto and Nemikin, two women currently incarcerated as civil contemnors in connection with this case.* See also Mr. Engle's statements with regard to the source of "leaks" used in compiling the New York Times story. (Proceedings 4-22-77 at pp. 25-29.)

Not only have the rules of grand jury secrecy been violated by the government, but they appear to have been violated in such a manner that the U.S. Attorneys are not even in a position to know whether the information they may receive in the course of a grand jury investigation is tainted by such a violation. It would be entirely possible, given the facts of this

* See affidavit of Cueto and Nemikin attorney Margaret Ratner dated May 12, 1977, filed with Grumbles motion in the District Court on behalf of contemnors in that case. See also Appendix N.

case to date, for immunized testimony from New York to wend its way to the Chicago grand jury which decides to indict Mr. Archuleta without ever recognizing the wholly illegitimate and dependent sources of their information - i.e. immunized testimony transmitted in violation of Rule 6(e), perhaps to one who did not know the source of the information, who in turn may transmit it to the grand jury.

The violations of grand jury secrecy and publication of highly prejudicial and inaccurate information from "confidential law enforcement sources" has already occurred. Grand jury transcripts have been disclosed without proper authorization. The damage has already been done, and no amount of future secrecy can repair it. Nor should the witness be forced to rely on a promise that similar violations will not recur in the future. It is clear that the government is not in the position to make such a promise.

The evidence from previous incidents in this case justifies the witness' belief that the immunity granted him is virtually worthless. To compel him to testify would be to make a mockery of the historic and constitutionally mandated role of the grand jury as a shield against hasty, malicious and oppressive prosecutions. Wood v. Georgia, 370 U.S. 375 (1962).

II. Adjudging This Witness In Contempt
For Failure To Testify Pursuant To
An Order Of Immunity Would Consti-
tute Judicial Approval of Govern-
mental Misconduct So Gross As To
Violate The Witness' Rights To Due
Process Of Law.

A witness who testifies pursuant to an order enforcing a grant of immunity must rely on Rule 6(e) of the Federal Rules of Criminal Procedure and whatever protective orders may be entered to protect his Fifth Amendment rights. Violation of those rights and/or the rule of grand jury secrecy by government officials would constitute a denial of the witness' rights to due process of law which courts should be loathe to sanction.

In In Re Cardassi, 351 F.Supp. 1080 (D. Conn. 1972), Judge Newman of the District of Connecticut declined to order a witness to testify when it appeared she might be subject to prosecution in another (foreign) jurisdiction. The government argued that her rights were adequately protected by Rule 6(e). The Court rejected the presumption that the government would abide by the rule as inadequate to protect the witness' Constitutional rights, saying:

The argument rests on the assumption that all law enforcement officials with access to grand jury minutes can be relied upon to abide by the disclosure requirements of Rule 6(e). While there is no reason to believe that any enforcement officials presently involved in this grand jury proceedings would not honor the rule, the constitutional protection of the witness must rest on more than faith.

351 F.Supp. at p. 1082

An essential distinction between that case and this one is that the presumption of regularity which normally attaches to grand jury proceedings and the government's handling of secret grand jury materials has already been severely undermined by the government's conduct in this case to date. Appellant has received no assurance from the office of the U.S. Attorney that the source of the "leaks" or highly prejudicial information to the press have been identified and sealed. In response to appellant's charge that the grand jury proceeding was tainted by governmental misconduct, the U.S. Attorney's office has issued only conclusory and evasive denials with no factual support whatever. The government has not deigned to report the results of an investigation ordered by Judge Lasker in response to evidence of a violation of Rule 6(e) at an earlier point in these proceedings. Instead, it engages in further disregard of Rule 6(e) by disclosing the Chicago grand jury minutes without Court order.

Courts have declined to compel testimony or punish recalcitrant witnesses on the basis of governmental misconduct of a far less serious and flagrant nature. For example, discretionary powers to supervise grand juries were exercised to vacate a previously ordered grant of immunity in In the Matter of John Doe, 410 F.Supp. 1163 (ED Mich. 1976). The witness had turned over a quantity of cocaine to a federal agent after being assured that his cooperation to that extent would prevent further questioning. The Court vacated an immunity order obtained by the U.S. Attorney's

office which subpoenaed him to a grand jury to testify in a related investigation. The Court reasoned by analogy to a plea bargain, and specifically found that the government could not rely on technical distinctions between separate phases of an investigation to escape responsibility for actions of FBI agents or other law enforcement agents working on the investigation. Doe indicates that courts should not, as a matter of due process, enforce orders to testify which involve gross governmental misconduct.

Similarly, Judge Brieant's unreported decision in In the Matter of Harvey Johnpoll (Unpublished memorandum and order of July 16, 1976, M11-188)* indicates that district judges in this jurisdiction will exercise their discretion to protect the rights of witnesses and the integrity of the grand jury process in situations where the government seeks to benefit from behavior far less questionable than that revealed in this case. In Johnpoll, Judge Brieant declined to order a recalcitrant witness confined because the government had breached an implied promise not to seek additional time in jail for a witness who entered a plea bargain on a substantive offense related to the matter before the grand jury. The government's misconduct, slight as it was, created "equities" in the witness' favor which prevented his commitment.

In this case appellant complains not that the government has violated its own promise, implied or expressed, but rather the principle of grand jury secrecy and Rule 6(e) of the

* See Appendix T.

Federal Rules of Criminal Procedure. This fact alone would create strong "equities" in appellant's favor which should enable a court to find, as a matter of due process, that the government should not be allowed to benefit from its own misconduct by way of compelled testimony from him. This would be the situation if appellant were subpoenaed to only one grand jury. However, where there are uncontrolled "leaks" of information to the press - and perhaps to prosecutors and/or law enforcement officials in other jurisdictions - and a likelihood that appellant may be indicted in a related investigation, the need for judicial protection of a witness' rights is much stronger.

The government will argue that appellant's rights are adequately protected by various protective orders entered by Judge Brieant on June 17. These orders fall far short of the protections necessary, however. They do not require the certification of evidence presently in possession of the government in Chicago, a procedure explicitly approved by the Second Circuit in United States v. Goldberg, 472 F.2d 513 (1973). The government likewise resisted, and the Court declined to order, a demonstration of particularized need for access to grand jury materials by each FBI agent authorized to inspect it, and no order was issued requiring notice to counsel or written records of all requests for permission to inspect grand jury materials. Such orders have been issued in other cases upon a much weaker showing of a likelihood of violations of Rules 6(e) and 54(c),

which, containing no authorization at all for disclosure to the FBI, would at the least require a very narrow application of any such limited disclosure. See Simplot v. U.S. District Court, (9th Cir. 5-2-77], 45 LW 2571.

However, even if such extensive protective orders were issued in this case, they would rest on the same presumption of regularity safeguarding grand jury secrecy generally, which presumption has been rebutted by the government's conduct in this case to date.

POINT III

IN VIEW OF A DISTRICT COURT FINDING OF A COLORABLE SHOWING OF ELECTRONIC SURVEILLANCE, THE CONCEDED NATIONAL SCOPE OF THIS INVESTIGATION, AND THE COURT'S SUGGESTION THAT NEW MEXICO SOURCES SHOULD BE CHECKED, THE GOVERNMENT'S REFUSAL TO CHECK CHICAGO, NEW MEXICO AND NEW YORK LAW ENFORCEMENT AUTHORITIES AND THE OTHERWISE INADEQUATE RESPONSE BY THE FBI AND THE JUSTICE DEPARTMENT REQUIRES THAT A CONTEMPT ORDER BE REVERSED.

Judge Lasker found that appellant had done all that could reasonably be expected of a private person to raise a colorable claim of electronics surveillance, based on the prosecutor's concession of the national scope of the investigation involving various jurisdictions and law enforcement authorities, the FBI investigative presence in Tierra Amarilla, New Mexico, since 1975, the participation of the New Mexico police bomb squad unit in the FALN investigation, the obvious involvement of the comparable unit in New York City, the admitted physical

surveillance of appellant in New Mexico, the various affidavits of appellant and his associates and attorneys in New York, New Mexico and Chicago attesting to recent and extraordinary voices, breathing, sounds and inexplicable interruptions on their various telephones, and the affidavits of appellant and Mary Lujan describing FBI use of knowledge gained from telephone conversations between them.

One need only read the New York Times to learn of the continuous uncovering of illegal wiretapping and other forms of illegal surveillance by local and federal law enforcement officials in cooperation. (See the almost daily reports of the New Haven Police Commissioner's investigation into State-FBI sponsored illegal tapping of 250 political activists in the years 1968-1971.) One need only refer to the fact that the government has not in the past made full disclosure of electronics surveillance. See, e.g., United States v. Hoffa, 307 F.Supp. 1129 (ED Tenn. 1970) where the government first denied surveillance of the defendant, id. at 1131, and then later determined and admitted it had earlier been in error. Id. at 1131-32. In Black v. United States, 385 U.S. 26, 87 S. Ct. 190 (1966), O'Brien v. United States, 386 U.S. 345, 87 S. Ct. 1158 (1967), and Hoffa v. United States, 387 U.S. 231, 87 S. Ct. 1583 (1967), the government failed to disclose wiretapping of criminal defendants until their cases were pending in the Supreme Court. See also Smilow v. United States, 409 U.S. 944, 93 S. Ct. 268 (1972) reversing

465 F.2d 802 (2nd Cir. 1972), where even after being told that Smilow called a telephone while the number was admittedly under surveillance by the federal government, the government had no record of his being overheard and was unable, until the case was before the Supreme Court, to determine whether Smilow had been overheard.

The realities of law enforcement in this country include, unfortunately, extensive eavesdropping. For the Courts, in a case like this, with its obvious high priority for law enforcement authorities all over the country, and the interfeeding of information among jurisdictions, and independent police and FBI agents acting without the knowledge or control of the prosecutor, to accept simple denials of personal knowledge of ELSUR on the part of one or two people near the top of the New York federal investigation, and an FBI headquarters check that is incomplete, is to reduce Gelbard and \$3504 to verbiage without substance. There is supposed to be a real right to refuse to answer questions derived from illegal electronics surveillance, about which only law enforcement agencies have the data. To effectuate this right the law enforcement agency check required should be realistic in the context of the particular case. Simple FBI denials are not, in the context of this case. And, the government has had months to make a complete check in this case.

Despite Judge Lasnik's finding and his suggestion that

New Mexico law enforcement be checked for possible electronics surveillance, and despite the prosecutor's own request that any claim of "ELSUR" be made at the motion to quash in order to give him time to make such a full and complete search, he now asks this Court to affirm the incarceration of appellant in disregard of Judge Lasker's findings and his own request that a claim be made earlier to enable a complete search. Now the prosecutor says Judge Lasker's suggestion that New Mexico law enforcement be checked need not be followed because it is not in accordance with the law, nor, he says, with Judge Brieant who, on signing the immunity grant, did not review the affidavits concerning the ELSUR claim, but rather referred the issue to the contempt stage of proceedings. Judge Owen merely regarded the government's affidavits as sufficient, without addressing the problem of the failure of local law enforcement checks. Apparent here is a grasping-at-straws attempt by the government to avoid a New Mexico check.

The FBI headquarters check is in itself inadequate for the reasons outlined in the statement of facts, supra, (See the testimony of Agent Smythe in the Weiner case described supra and Appendixed at Q), and although New York FBI field office was asked to make its own check, the affidavits from New York rely only on the Washington headquarters index. Most importantly, neither the headquarters nor the field offices in the FBI has a record of FBI information derived from other agency tapping. (Id.)

And, the conspicuous absence of any New York or Chicago or New Mexico Police Department check is further reason to withhold judgment on this issue. In Re Millow, 529 F.2d 770 (2d Cir.); United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974); In Re Tierney, 465 F.2d 806, 812 (5th Cir. 1972); Elhias v. United States, 364 U.S. 206 (1960).

The prosecutor's belated attempts at the contempt proceedings on June 30, to cure the two New York FBI field office affidavits by a simple representation that Agent Butkiewicz had just told him that New Mexico and Chicago FBI field offices were checked, makes no sense. The New York affidavits do not give the results of the New York check and neither does anything in the prosecutors unknowledgeable assertion. If real checks had been made, affidavits could and should have been made by the persons directly responsible. There is nothing from New Mexico and Chicago and no results from New York. We also do not know the time span or subjects or whether telephone numbers were checked in those field offices. Obviously if the prosecutor did not know that New Mexico and Chicago field office checks had been made, if they were, it is reasonable that the FBI might not tell him that information is derived from ELSUR sources. This is the point of requiring particularized averments. See United States v. Schipani, 289 F.Supp. 43, 46 (EDNY, 1968); United States v. Alter, 482 F.2d 1016, 1026 (9th Cir. 1973).

The questions that have been posed do not dispel the

the spectre of ELSUR, since the source for reason to believe that appellant would have in his testimonial possession the information requested is unknown. (See Point I, supra.) It may safely be assumed, however, that unless there is some informant somewhere, such a source would only have been eavesdropping on conversations which would not ordinarily be otherwise disclosed to a policeman or FBI agent. Notwithstanding an informant and notwithstanding personal denials from the prosecutor, the law is clear that if the ultimate source for any of the information used to construct questions which deal with "any time prior to January 24, 1975" and "anybody who was responsible for the bombings at Fraunces Tavern," is illegal eavesdropping the question need not be answered. Wong Sun v. United States, 371 U.S. 471; 18 U.S.C. §3504; Gelbard v. United States, 408 U.S. 41 (1972).

This Court's recent decision in United States v. Yanagita, Docket No. 76-1405, March 30, 1977, states that the sufficiency of the government's response to a colorable claim will be measured by the type of proceeding (trial in that case as opposed to grand jury), the stage of the proceeding (minutes before the start of the trial in that case as opposed to two months ago when the claim was first raised here), the scope of the government's intended examination of the witness (here events stretching between the years 1968 and 1975, and involving persons believed to be all over the country and subjects of a national investigation), and the time required for a full and

complete agency check, and the extent of the disruption that will be caused by the witness' claims. As to the latter, appellant made his claim two months ago, notwithstanding unripeness, in response to government request for time to make an adequate response. Thus any disruption in process here at this stage of the proceedings due to inadequacy of response, and particularly with respect to the failure to make any attempt at a New Mexico ELSUR check, is caused by the government. In any case, this Court specifically excepted grand jury proceedings from its holding in Yanagita.

During a continuing grand jury proceeding, the usual setting for claims under §3504, time is usually not as much of the essence as during a trial because the grand jury sits for a much longer period of time than the average trial jury and thus may recall a witness after his §3504 request has been answered. Under these circumstances, a §3504 request will rarely be rejected as untimely, and the government has been held to a high standard of completeness in responding to such a request.

Slip. op. at 2606
(emphasis added)

United States v. Grusse, 515 F.2d 157 (2d Cir. 1975), also cited by the prosecutor, affirmed a procedure in the District which permitted a hearing, cross-examination of the prosecutor, on the adequacy of the ELSUR check. Appellant here was denied a hearing and the opportunity to present Agents Smythe, La Prada, Crowe and the prosecutor for examination. Time was also a distinguishing factor in Grusse, because the coercive time limit

of the grand jury at the time of the contempt was only two months.

In Re Buscaglia, 518 F.2d 77 (2d Cir. 1975) was an investigation confined to gambling in two specific social clubs. The government response was sufficient there because the Agent conducting surveillance of the clubs averred no ELSUR, and the prosecutor averred that the questions were prepared specifically from undercover observation inside the clubs. The investigation in this case is sweeping and national, and we do not have affidavits from the investigators closest to the scenes in New York, New Mexico and Chicago.

POINT IV

APPELLANT HAS THE CONSTITUTIONAL AND STATUTORY RIGHT AND CONSEQUENT STANDING TO CHALLENGE THE COMPOSITION OF THE GRAND JURY THAT SEEKS, ALBEIT AS THE RESULT OF AN UNINFORMED OR UNEXERCISED DISCRETION IN THIS CASE, TO INCARCERATE HIM AND HE THEREBY IS ENTITLED TO THE JURY SELECTION RECORDS AND A REASONABLE TIME TO MAKE THE CHALLENGE.

Since a grand jury in the Southern District and the particular Grand Jury in this case have the kind of discretion described by this Court (per Chief Judge Kaufman) in its decision granting standing to State contemnors to attack the composition of the grand jury which had incarcerated them for refusal to answer questions (see instructions of Judge Brieant to the instant Grand Jury on June 17, 1977), United States ex rel. Chestnut

v. Criminal Court of the City of New York, 442 F.2d 611, 615n.7 (2d Cir. 1971), appellant in this case should be granted the materials requested and a reasonable amount of time to enable him to make a challenge to the composition of the jury pools in this case. As Judge Lasker opined, while holding the issue premature on a motion to quash,

There is no denying, however, that even in the federal system a grand jury exercises substantial discretion in calling and questioning witnesses, and that under the reasoning of Chestnut, such a witness has a constitutionally protected interest in assuring that the grand jury is not tainted by the impermissible exclusion of racial or ethnic groups.

(Appendix C at p. 15)

Although Judge Lasker was concerned about the disruption of grand jury that would be caused by challenges at the motion to quash stage, he recognized that it may be necessary once a possibly tainted grand jury decides to disrupt by imprisonment the life of an innocent witness. "To permit disruption of the grand jury is surely not warranted until and unless the witness is actually placed in jeopardy by virtue of the government's actions." (Appendix C at p. 21.)

Judge Lasker's doubts that Chestnut, a six year young decision, and the only decision, by the Chief Judge of this Circuit, may not be controlling are not warranted. It must be assumed that the Chief Judge was aware of Blair v. United States, 250 U.S. 273 (1919) which antedated Chestnut by fifty years, and

which, besides its restrictions on attacks on a grand jury's jurisdiction to investigate under an unconstitutional statute, held, "in other cases for special reasons a witness may be excused." 250 U.S. at 281. It must be assumed that the Chief Judge was also aware of all the cases cited in Point I, supra, which post-dated Blair and entertained attacks on the authority of the grand jury to act under various abusive circumstances, and, it must be assumed that the Chief Judge was aware of the balance that must be struck between the grave consequence of imprisonment of individuals who, as witnesses, refuse to testify before a tainted grand jury and the disruption of a tainted grand jury's investigation. It must be assumed that the Chief Judge struck that balance in favor of the witness. And, as Judge Lasker correctly concluded, United States v. Calandra, 414 U.S. 338 (1974), which approved Blair, did not deal with this question and, "does not control disposition of the question before us; certain interests considered relevant there are obviously different from those here at stake." (Appendix C at p. 17.) And Judge Parsons in the Northern District of Illinois reached the merits of appellant's composition challenge in that District, although he found against him on July 5, 1977. No question was ever raised there of appellant's standing to challenge the composition of the grand jury seeking his incarceration.

Although the jury wheel records must be accorded to litigants with the Constitutional right to challenge the array,

appellant submits he also has standing under 28 U.S.C. §1867. Section (e) of that statute accords the Constitutional standing as Judge Lasker has rightly noted. . (Appendix C at p. 12.) Appellant submits that he also has statutory standing under sections (a) and (f) to make the challenge and obtain the records for that purpose. Section (a) states that "in criminal cases...the defendant may move..." and section (f) states that the records shall not be disclosed except pursuant to a motion under sections (a), (b) and (c). If statutes are to be construed in accordance with the Constitution then section (a) must be interpreted to include a grand jury contemnor, civil or criminal, for it cannot be assumed that Congress intended to exclude from access to the wheel those who have a Constitutional right to access.* Furthermore, since the threat of imprisonment is the coercion that makes a civil contempt effective, "The civil label does not obscure its penal nature." United States v. John Sun Kung Kang, 468 F.2d 1368, 1369 (9th Cir. 1972). About contempts the Supreme Court said in 1903, "that they are criminal in their nature has been certainly affirmed." Bessette v. Conkey, 194 U.S. 324. And Judge Learned Hand of this Circuit went further to state that the rule for determining whether a contempt was criminal was simply its pro-

* That 28 U.S.C. §1861 states a policy of securing these rights to all litigants in Federal Courts entitled to trial by jury could not be read to limit the language of §1867(a), which refers to all criminal defendants, to only those criminal defendants entitled to trial by jury else the same Constitutional objection to the statute.

secution by the United States, Court, or an attorney directed by the Court to prosecute on its behalf. McCann v. New York Stock Exchange, 80 F.2d 211, 214 (2d Cir. 1935.)

Appellant has made a minimal showing of underrepresentation of Spanish people in the jury pools, and this is all he can do without access to the jury wheel: "...without inspection, a party almost invariable would be unable to determine whether he has a potentially meritorious jury challenge." For this reason his right to these materials is virtually unqualified. Test v. United States, 420 U.S. 28, 42 L. Ed2d 786, 789 (1975).

The prosecutor has raised the case of United States v. Rodriguez, 75 Cr. 750, SDNY, January 27, 1976 (Brieant, J) for the proposition that Spanish people are not a cognizable class, basically because their most recent national origins may be different. This decision, we submit, is wrong and does not follow precedent of the Supreme Court of the United States which has recognized that persons of any race, ethnicity or ancestry clearly constitute a cognizable class. In addition to the numerous cases concerning Blacks, itself a class made up of varying recent national origins, see, e.g. Hernandez v. Texas, 347 U.S. 475 (1954) (Spanish); United States v. Fujimoto, 105 F.Supp. 727 (D. Hawaii) cert. den. 344 U.S. 852 (1953) (non-Caucasians); Montoya v. Colorado, 141 Colo. 9, 345 P.2d 1062 (1959) (Spanish sounding names), and most recently Casteneda v. Partida, 97 S. Ct. 1272, decided March 23, 1977. There, the Supreme Court held,

Spanish surnames are just as easily identifiable as race was from the questionnaires in Alexander or the notations and card colors in Whitus v. Georgia and in Avery v. Georgia...

97 S. Ct. at p. 1280

...the system is susceptible to abuse as applied...persons with Spanish surnames are readily identifiable.

Id. at p. 1287

And the Court upheld the challenge despite questions raised about the psychology of class attitudes.

The problem is a complex one, about which widely differing views can be held, and, as such, it would be somewhat precipitous to take judicial notice of one view over another on the basis of a record as barren as this.

Id. at p. 1287

On the issue of the failure of exercise of an informed discretion on the part of the grand jurors in their decision to call, question, and "indict" appellant (See Point I, supra), it should be noted that it is the practice in this District, and therefore the law here,

to inform the Grand Jury of its powers, specifically, to inquire into federal offenses and conduct independent inquiry of witnesses and documents, all as has been the custom and practice in this district for many years. See specimen Grand Jury Charge used by the Hon. Irving R. Kaufman, Chief Judge of this Circuit, 17 F.R.D. 331, 335, 336 (1955).

In the Matter of a Witness Harvey Johnpoll, before the Grand Jury (M11-188), SDNY July 16, 1976 (Brieant, J) opinion attached at Appendix U.

It may not be gainsaid that if there is discretion in the grand jurors, and that discretion is not informed or not exercised or not exercised on the basis of reasonable standards, the situation in this case, appellant should not be incarcerated thereby. Judge Briant, on June 17, asked them only if the questions were necessary to their purpose; he did not ask if they had determined that this witness was, on the basis of some evidence, possibly possessed of answers that would aid the purpose, and they were not asked if they wanted him incarcerated in order to get those answers. They were never instructed as to standards for using their coercion to call and incarcerate particular witnesses.

POINT V

FINGERPRINTS, PHOTOGRAPHS, AND OTHER
PARTICULARS TAKEN FROM APPELLANT OVER HIS
OBJECTION UPON HIS INCARCERATION PURSUANT
TO THIS CIVIL CONTEMPT SHOULD BE EXPUNGED

Appellant was fingerprinted and booked by the United States Marshals, over his objection, upon his incarceration at the Metropolitan Correctional Center. Judge Owen was asked, but declined to order, that the Marshals be directed to refrain from doing this, ordering them only to do what is "customary" with civil contemnors. One of the outstanding subpoenas against appellant in the Northern District of Illinois is for the very same particulars.

The United States Marshall's Manual (December 15, 1971 edition at p. 613) states,

persons arrested on civil process should not be compelled to submit to fingerprinting if they object.

If the fingerprints are not expunged here, then the dual grand jury technique employed by the government in this case, will have deprived appellant of his rights in Chicago, and the subpoena process there will have been subverted.

The fingerprinting and booking of a civil contemnor illustrates once again that the civil-criminal distinction is used alternately to incarcerate without due process and then to impose penalties or forfeiture no different from criminal defendants entitled to due process (See Point IV, supra.)

CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER OF CONTEMPT SHOULD BE VACATED AND APPELLANT'S FINGERPRINTS EXPUNGED, OR, ALTERNATIVELY, THE ORDER SHOULD BE STAYED AND APPELLANT RELEASED PENDING A DETERMINATION ON THE LEAKS INVESTIGATION AND THE CHICAGO PROCEEDINGS.

Respectfully submitted,

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